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Management's Attitudes and the Need for the Workplace Fairness Act

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Management's Attitudes and the Need For The Workplace Fairness Act

JACK J. CANZONERI*

TABLE OF CONTENTS

Introduction	206
I. Background	209
A. The <i>Mackay</i> Doctrine and the National Labor Relations Act.....	209
B. Summary of Existing Arguments Supporting Enactment of the Workplace Fairness Act.....	213
1. The <i>Mackay</i> Doctrine is Inconsistent with the Intent of the NLRA.	213
2. Restoring Judicial Limitation of the <i>Mackay</i> Doctrine.....	219
3. Rectifying the Imbalance in Available Economic Weapons.....	223
4. The <i>Mackay</i> Doctrine is Predicated on Invalid Assumptions	227
II. Changes in Management's Behavior Regarding Permanent Replacement Workers.....	228
A. The Rare Use of Permanent Replacements Prior to the 1980s	229
B. The "Carrot" of Permanence is not Needed to Attract Sufficient Numbers of Replacements.....	231
C. Increased Actual and Threatened Use of Permanent Replacements in the 1980s and Early 1990s	233
III. Construing Management's Attitudinal Emboldenment	237
A. The Non-Necessity of Permanent Replacements and Their Devastating Anti-Union Effect Expose Managements' Attitudes.....	238
B. Collateral Evidence Further Illustrating Management's Increasingly Hostile Attitude Towards Unions	241
IV. Conclusion	243

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INTRODUCTION

In 1991 the Workplace Fairness Act¹ was passed by the House of Representatives,² but subsequently failed in the Senate³ in June of 1992 because the majority supporters of the bill could not muster the two-thirds vote required to overcome a filibuster by the minority Republican opposition.⁴ The legislation, which the Bush Administra-

1. H.R. 5, 102d Cong., 1st Sess. (1991); S. 55, 102d Cong., 1st Sess. (1991).

2. H.R. 5 passed on July 17, 1991, by a margin of 247-182. *House Passes Striker Replacement Bill but Falls Short of a Veto-Proof Majority*, Daily Lab. Rep. (BNA) No. 138, at A-11 (July 18, 1991), available in LEXIS, BNA Library, DLABRT File.

3. The bill considered in the Senate was numbered S. 55. S. 55, *supra* note 1. Section 1 of the bill is entitled "Prevention of Discrimination During and at the Conclusion of Labor Disputes," and it would amend § 8(a) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1988), by making the following employer activity an unfair labor practice (ULP):

(6) to promise, to threaten, or take other action -

(i) to hire a permanent replacement for an employee who -

(A) at the commencement of a labor dispute was an employee of the employer in a bargaining unit in which a labor organization was the certified or recognized exclusive representative or, on the basis of written authorizations by a majority of the unit employees, was seeking to be so certified or recognized; and

(B) in connection with that dispute has engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection through that labor organization; or

(ii) to withhold or deny any other employment right or privilege to an employee, who meets the criteria of subparagraph (A) and (B) of clause (i) and who is working for or has unconditionally offered to return to work for the employer, out of a preference for any other individual that is based on the fact that the individual is performing, has performed, or has indicated a willingness to perform bargaining unit work for the employer during the labor dispute.

S. 55, *supra* note 1, § 1. Section 2 of S.55, entitled "Prevention of Discrimination During and at the Conclusion of Railway Labor Disputes," would similarly amend the Railway Labor Act of 1926, 45 U.S.C. §§ 152-217.

While non-union employees are included within the protections of the NLRA, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962), S. 55 conspicuously excluded non-union workers from its provisions, S.55, *supra* note 1, at § 1(2). This most likely reflects a compromise to opponents of the Workplace Fairness Act who were concerned that the proposed legislation would apply to non-union workers. See *Prohibiting Discrimination Against Economic Strikers: Hearings on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 195, 200 (1991) [hereinafter *Labor Comm. Hearings*]. But see *id.* at 189 (statement of Professor Weiler arguing that the legislation would not apply to non-union companies).

4. *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A-9 (June 17, 1992), available in LEXIS, BNA Library, DLABRT File [hereinafter *Senate Vote Kills Bill*]. Senate Republicans led a filibuster that prevented the bill from being brought to the floor for a vote. *Id.* A motion for cloture ending a filibuster requires a two-thirds vote in order to pass. Since the vote count was 57 to 42, the motion for cloture did not pass, and the bill was effectively killed. *Id.* Proponents of the bill in the Senate vowed to continue pressing for passage of the legislation. *Id.*

tion would have vetoed even if it had passed both houses of Congress,⁵ is designed to overturn the 1938 Supreme Court dictum in *NLRB v. Mackay Radio & Telegraph Co.*⁶ The dictum in *Mackay* sanctions management's prerogative to permanently replace striking workers.⁷

In an attempt to end the filibuster, Bob Packwood, a Republican Senator from Oregon, introduced a compromise amendment to the Workplace Fairness Act. *Statements and Summaries of Amendment to S. 55*, Daily Lab. Rep. (BNA) No. 114, at E-1 (June 12, 1992). His proposal qualified the Workplace Fairness Act's absolute ban on permanent replacements. The Packwood Amendment provided that, before engaging in a strike, the union must provide seven days' notice to both the employer and the Federal Mediation and Conciliation Service (FMCS), indicating that the union consents to the formation of a fact-finding mediation panel composed of three members. *Id.* If the employer rejects the union's request, the union is allowed to strike and the employer is prohibited from hiring permanent replacements. *Id.* However, if the union fails to give the requisite notice before striking, the employer is permitted to hire permanent replacements. *Id.*

The proposed amendment also provided that if, following the union's seven-day notice, the employer agrees to the formation of a three member mediation panel, labor and management would then proceed to independently choose one panelist each; the third panelist would be chosen with the acquiescence of both labor and management. *Id.* The panel would investigate the economic circumstances underlying the dispute and conduct hearings listening to arguments from both sides. *Id.* During the pendency of the panel's investigation the status quo would be maintained: (1) the current collective bargaining agreement would continue in effect for 45 days; (2) the union would be prohibited from striking; and (3) management would be prohibited from hiring permanent replacements. *Id.*

Senator Packwood's proposal also called for the mediation panel to propose and recommend a settlement at the conclusion of its investigation. *Id.* If the union accepts and the employer rejects a recommendation, the union may strike and the employer could not hire permanent replacements. *Id.* However, if the union rejects a panel recommendation and strikes, the employer could permanently replace strikers, irrespective of whether the employer rejected or accepted the panel's recommendation. *Id.*

Lobbyists for employers opposed the Packwood Amendment, while the A.F.L.-C.I.O. supported it. *Business Representatives Oppose Packwood Amendment to Striker Bill*, Daily Lab. Rep. (BNA) No. 116, at A-12 (June 16, 1992), available in LEXIS, BNA Library, DLABRT File.. The Packwood Amendment failed to resolve the conflict over the Workplace Fairness Act, and the filibuster effectively killed the bill. *Senate Vote Kills Bill*, *supra*, at A-9.

5. *Veto of Striker Replacement Bill Threatened by Bush Administration*, Daily Lab. Rep. (BNA) No.45, at A-8 (Mar. 7, 1991), available in LEXIS, BNA Library, DLABRT File. Labor Secretary Lynn Martin told Congress that, if the Senate passes S.55, "President Bush's senior advisors would recommend that he veto [the] legislation prohibiting the permanent replacement of workers who participate in an economic strike." *Id.* Significantly, President-Elect Bill Clinton supports passage of the Workplace Fairness Act. *Unions Unite Behind Clinton as the Best Choice for Labor*, Daily Lab. Rep. (BNA) No. 134, at C-1 (July 13, 1992), available in LEXIS, BNA Library, DLABRT File. Moreover, Vice-President-Elect Albert Gore was among the 57 Senators voting in favor of the motion for cloture which would have ended the opposition's filibuster and forced a vote on the legislation. *Senate Vote Kills Bill*, *supra* note 4, at A-9.

6. 304 U.S. 333 (1938).

7. 304 U.S. at 345-46. This employer prerogative to permanently replace workers striking for economic reasons is referred to as the *Mackay* doctrine prerogative.

While legal scholars have long debated the merits of the *Mackay* doctrine,⁸ organized labor and management have only recently begun to express vehement and contrasting views on this issue.⁹ Part I.A of this article will review the *Mackay* doctrine and the historical context from which it emerged. Part I.B summarizes existing arguments advocating passage of the Workplace Fairness Act.

Part II examines an issue that is crucial to the debate: whether management's use and threatened use of permanent replacements has significantly increased in the past decade. Evidence will be set forth demonstrating that management has increasingly used, threatened to use, and had the propensity to use permanent replacements. This evidence receives separate attention since it is an intensely disputed point,¹⁰ and its full development is necessary to the argument which will be presented in Part III.

Part III presents an argument justifying passage of the Workplace Fairness Act not fully developed by proponents of the bill: management's increasing hostility towards the very existence of unions and the process of collective bargaining has detracted from the goals of the NLRA. Further, while passage of the Workplace Fairness Act cannot change management's attitudes, it may help to attenuate the effect of those attitudes by limiting the legitimate scope of their expression, thereby furthering the goals of the NLRA.¹¹

8. *E.g.*, Leonard B. Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 830-32 (1941) (arguing that an employer cannot retain replacement workers when strikers request reinstatement); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966) (arguing that the *Mackay* doctrine violates the intent of the NLRA). *But see* David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. L.J. 137, 146 (Winter 1991) (arguing that *Mackay* provides an essential system of checks and balances in collective bargaining).

9. *See* William H. Miller, *Labor and Management Forces are Girding for a Brawl over a Proposed Ban on Hiring Permanent Striker Replacements*, INDUSTRY WK., July 2, 1990, at 56. Indeed, the bill is among the highest legislative priorities for both organized labor and business. *Id.*

10. The proponents of the bill asserted that there has been a substantial increase in the use of permanent replacements since the 1980s. S. REP. NO. 111, 102d Cong., 1st Sess. 10-16 (1991); H.R. REP. NO. 57, 102d Cong. 1st Sess., pt. 3, at 17-20 (1991). However, its opponents argued that there had not been an increase or change in management's use of permanent replacements in the 1980s. S. REP. NO. 111, *supra*, at 39-40; H.R. REP. NO. 57, *supra*, at 46-47.

11. This argument parallels the logic supporting anti-discrimination legislation. While such legislation cannot change race, age or sex biases, it can limit the effect of these attitudes by limiting the legitimate scope of their expression. *E.g.*, Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1988) (prohibiting employers from discriminating on the basis of race, color, religion, sex or national origin in employment decisions); Age Discrimination Act of 1975 § 301, 42 U.S.C. § 6101 (1988) (prohibiting discrimination on the basis of age for federally funded programs).

I. BACKGROUND

A. *The Mackay Doctrine and the National Labor Relations Act*

Any discussion of the *Mackay* doctrine must be prefaced by a review of the National Labor Relations Act (NLRA)¹² and the historical context from which it emerged.¹³ The NLRA grew out of a period of wide spread poverty and labor turmoil. At the end of World War I, "15 million American families were living in poverty and 86 percent of wage earners were receiving incomes below the level of health and decency."¹⁴ From 1933 to 1935 "uncontrolled, and economically crippling labor-management conflicts . . . pervaded the American economy."¹⁵ In particular, there was a proliferation of strikes. In 1933 there were 812,137 workers involved in strikes; the number rose to 1,277,344 the following year.¹⁶ In addition to this significant increase in strike activity,¹⁷ striking workers were permanently replaced in sixty percent of such strikes.¹⁸ Due in part to this tremendous conflict, organized labor had been reduced to one half the strength it had attained in the 1920s.¹⁹

Prior to the enactment of the NLRA in 1935,²⁰ the growth of unionism was impeded by Supreme Court decisions. For example, the Court used anti-trust laws, initially intended to regulate business at the turn of the century, to limit the ability of unions to en-

12. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1988).

13. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 39-42* (1983) (reviewing some of the major themes espoused in 1935 justifying passage of the bill).

14. *A Bill to Promote Equality of Bargaining Power Between Employers and Employees, to Diminish the Causes of Labor Disputes, to Create a National Labor Relations Board, and for Other Purposes: Hearings Before the Senate Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 34 (1935) [hereinafter *NLRA Hearings No. 1*] (statement of Sen. Wagner), reprinted in *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935*, at 1408 (1985) [hereinafter *NLRA HISTORY*].

15. ECONOMIC POLICY INSTITUTE, *SEMINAR: EMPLOYEE RIGHTS IN A CHANGING ECONOMY* 6 (1991). See also Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 358 (1984) (noting that the NLRA emerged in the context of "serious industrial unrest").

16. *NLRA Hearings No.1*, *supra* note 14, at 36. "Within a span of 24 months, over 32,000,000 man-days were lost because of labor controversies." *Id.*

17. See Weiler, *supra* note 15, at 369 n.59 ("The ratio of time lost due to strikes jumped fivefold, from an average of .05% of the time worked between 1929 and 1931 to .25% between 1933 and 1935.").

18. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 22 (citing WILLIAM SPRIGGS, *THE PERMANENT REPLACEMENT OF STRIKING WORKERS: MICRO-LEVEL EVIDENCE FROM BEFORE THE WAGNER ACT* (Economic Policy Institute Working Paper, 1990)).

19. ATLESON, *supra* note 13, at 35. Professor Atleson also notes that "[t]he New Deal began at a time when less than 10 percent of the work force was organized." *Id.*

20. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (1988)).

gage in concerted activity.²¹ Even legislation specifically enacted as a means of fostering unionism was declared unconstitutional by the Supreme Court.²² To the extent that the labor movement was able to overcome these obstacles and mobilize workers, it was still hindered by rulings sharply limiting its activities. In one case the Court held that only one union worker at a time could picket a struck employer.²³

In passing the NLRA, Congress intended to remedy serious industrial unrest and promote industrial peace by enhancing the legitimate function of unions in our society.²⁴ One element of the legislative strategy was to prohibit discharge of or discrimination against a union worker for engaging in statutorily protected union activities such as the strike.²⁵ A Senate Committee Report assessing the Workplace Fairness Act noted:

At the core of the Act is Congress' intent to promote collective bargaining as the preferred method of resolving labor-management disputes and preserving economic stability in the private sector. . . .

The NLRA promises workers that they shall have the right, without fear of employer discipline [sic] or discharge, to join unions, to bargain collectively, and—if no agreement can be reached—to participate in peaceful concerted activity to further their bargaining goals.²⁶

21. *Loewe v. Lawlor*, 208 U.S. 274, 275-76 (1908) (declaring that antitrust laws were applicable to labor as well as capital); *NLRA Hearings No. 1*, *supra* note 14, at 34.

22. *Coppage v. Kansas*, 236 U.S. 1, 4 (1914) (Kansas law imposing penalties on employers who required as a condition of employment that employees not join labor unions violated Due Process Clause of the 14th Amendment); *Adair v. United States*, 208 U.S. 161, 180 (1907) (holding that Congress lacked power under the Commerce Clause to prohibit interstate railroads from discriminating against employees because of union membership).

23. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 206 (1921). "We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress [to] the plant." *Id.*

24. See S. REP. NO. 111, *supra* note 10, at 3. "The longer range expectation was that, by thus endorsing the fundamental legitimacy of union representation, the law would lay the foundation for constructive dialogue as the labor relations system evolved." Weiler, *supra* note 15, at 369 n.60.

25. NLRA §§ 7, 8(a)(1)(3), 29 U.S.C. §§ 157, 158(a)(1)(3) (1988).

26. S. REP. NO. 111, *supra* note 10, at 3; see also Weiler, *supra* note 15, at 365. In 1935 the House Committee on Labor commented:

[T]he [NLRA] seeks to redress an inequality of bargaining power by forbidding employers to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strike and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot [exploit] the economic weakness of his employees.

H.R. REP. NO. 969, 74th Cong., 1st Sess. 14 (1935), reprinted in *NLRA HISTORY*, *supra* note 14, at 2924.

Congress was also aware that seventy-five percent of all work stoppages were "due directly or indirectly to the failure of the employer to recognize the rights of the employee to organize."²⁷ As a means of eliminating the need for "recognition strikes," Congress delegated to the National Labor Relations Board (NLRB) resolution of the issue of a given union's status as a collective bargaining agent.²⁸ This separated the determination of a union's status from the private actions of labor and management. The NLRA established that the NLRB would determine a union's representational status through NLRB-supervised certification elections.²⁹ Congress believed that "the device of the election in a democratic society ha[d], among other virtues, that of allaying strife, not provoking it."³⁰ These certification elections would be the sole means to determine whether the union would be recognized as the exclusive bargaining representative of the employees,³¹ and whether the employer would therefore be obligated to bargain in good faith with the union over the terms of the collective bargaining agreement.³² However, determination of the terms and conditions of the collective bargaining agreement remained with labor and management bargaining in the context of the marketplace, each with access to such legitimized means of self-help as the strike and the lock out.³³

The seminal case of *NLRB v. Mackay Radio & Telegraph*³⁴ gave

27. *To Create a National Labor Board: Hearings on S.2926 Before the Comm. on Educ. and Labor*, 73d Cong., 2d Sess. 14 (1934) [hereinafter *NLRA Hearings No. 2*] (testimony of Sen. Robert F. Wagner), reprinted in *NLRA HISTORY*, *supra* note 14, at 44.

28. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). See also Weiler, *supra* note 15, at 369 n.60, noting that "[o]ne tangible contribution of the Act was to substitute a formal legal procedure for employee self-help in securing collective bargaining rights, thereby removing the need for the 'recognition' strikes that racked industry in the 1930s."

29. NLRA § 9(c)(1), 29 U.S.C. § 159 (c)(1) (1988).

30. H.R. REP. No. 969, *supra* note 26, at 20, reprinted in *NLRA History*, *supra* note 14, at 2930.

31. NLRA § 9(a), 29 U.S.C. § 159(a) (1988).

32. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988). See generally JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 123-37 (1988) (discussing the role of the law in insuring good faith bargaining).

33. See Weiler, *supra* note 15, at 385.

The tone of American labor law, especially as set by the Supreme Court, is unmistakable: once the NLRB has performed the task of protecting the right of workers to organize, it is to stand above the fray and not concern itself with the outcomes produced by the new collective regime. Outcomes are regarded as the result of natural economic forces for which the law should not be held responsible

Id. It is also argued that the NLRA was intended to promote the employer's acceptance of "national or pattern agreements, seniority, work rules, and expanding wages and benefits." Roger Keeran & Gregory Tarpinian, *Public Policy and the Recent Decline of Strikes*, 18 POL'Y STUD. J. 421, 463 (1989).

34. 304 U.S. 333 (1938).

the Court one of its first opportunities to interpret the newly enacted NLRA. The Court held that the NLRB was correct in ruling that Mackay Radio & Telegraph Co.³⁵ committed an unfair labor practice when, at the conclusion of an "economic"³⁶ strike it refused to reinstate five striking workers who had participated prominently in union activities.³⁷

However, the critical significance of the decision is not its holding, but is instead its "classic obiter dictum,"³⁸ commonly referred to as the *Mackay* doctrine. Justice Roberts, in this well-known dictum, commented that it was not an unfair labor practice when Mackay Radio permanently displaced its striking employees:

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 . . . pro-

35. In particular, the practices of one branch of the Mackay Radio and Telegraph Company located in San Francisco were at issue. *Id.* at 336.

36. "Economic" strike and "unfair labor practices" strike are terms of art in the field of labor law.

Section 2(3) of the [NLRA] provides that strikers retain their employee status while on strike. Whether they have an absolute right to reinstatement, however, depends primarily upon whether the stoppage is determined to be an unfair labor practice strike or an economic strike. An *unfair labor practices strike* is strike activity initiated in whole or in part in response to unfair labor practices committed by the employer. An *economic strike*, is one that is neither caused nor prolonged by an unfair labor practice on the part of the employer. . . .

....

...[A] strike which begins as an economic strike may be converted into an unfair labor practice strike by acts of the employer, thereby changing the status of the participants to unfair labor practice strikers. . . .

WALTER E. OBERER ET AL., CASES AND MATERIALS ON LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 501 (3d ed. 1986) (citing CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 1007-15 (1983)). See also *Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983) (explaining the difference between "economic" and "unfair labor practices" strikes).

37. 304 U.S. at 338-39. The union charged that the Mackay Radio & Telegraph Co. had

discharged and was refusing to employ five men who had not been reinstated to their positions for the reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employees of the respondent for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employees in the exercise of their rights guaranteed by section 7 of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of section 8(1) of the act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of section 8(3) of the act.

Id. at 339 (footnotes omitted).

38. Samuel Estreicher, *Strikers and Replacements*, 38 LAB. L.J. 287, 289 (1987).

vides, "Nothing in this Act. . . shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. *The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.*³⁹

Despite the fact that this language was mere dictum, it has endured as controlling law to this very day and has been elevated to the status of a doctrine, albeit a doctrine which legal scholars, and more recently organized labor, have strongly criticized.⁴⁰

B. *Summary of Existing Arguments Supporting Enactment of the Workplace Fairness Act*

1. *The Mackay Doctrine is Inconsistent with the Intent of the NLRA.* The NLRA is Congress' primary effort to promote harmony in labor-management relations. In creating the *Mackay* doctrine, the Supreme Court has weakened congressional efforts in three respects. First, the *Mackay* doctrine is fallaciously predicated on the notion that there is a distinction between permanently replacing and firing a union worker for engaging in strike activity.⁴¹ Opponents of the Workplace Fairness Act (i.e., management) argue that there are significant practical differences because entitlements and benefits are either guaranteed or withheld depending on whether the worker was "fired" or "replaced."⁴² If a worker is fired, he is no

39. 304 U.S. at 345-46 (emphasis added) (footnotes omitted).

40. "[F]ew rules of American labor law have been as heavily criticized as the legality of hiring permanent strike replacements." Weiler, *supra* note 15, at 393. Professor Atleson argues that the *Mackay* doctrine "assumes a set of rights that allows an employer 'to protect and continue his business,'" and that it deviates from the intent of the NLRA. ATLESON, *supra* note 13, at 18-34. See *supra* part I.B for an elaboration of the arguments against the *Mackay* doctrine.

41. The NLRA prohibits discharge of any union worker for engaging in such concerted activities as striking. NLRA § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (1988). Under the *Mackay* doctrine, an employer's permanent replacement of striking workers is not an unfair labor practice because the doctrine distinguishes between permanently replacing a worker and permanently firing a worker. *Mackay*, 304 U.S. at 345-46. See *infra* notes 49-52 and accompanying text (arguing that the distinction between permanent replacement and firing is not material under the principles of the NLRA).

42. See Thompson, Mann & Hutson, *Fired vs. Replaced: A World of Difference* (Issue Paper) in *Prohibiting Permanent Replacement of Striking Workers: Hearings on H.R. 5 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 54 (1991) [hereinafter *Aviation Comm. Hearings*]; *Labor*

longer considered to be an employee of the company and has no guarantee of reinstatement. But if the employer permanently replaces a striking worker, he or she must be reinstated as long as there is a position available after the strike ends.⁴³ Other benefits which are guaranteed to permanent replacements but withheld from fired workers include access to health care benefits, unemployment insurance, accrual of seniority, and the right to vote on all decisions affecting the bargaining unit for a full year after replacement.⁴⁴ Given the disparities in benefits available to replaced as opposed to fired workers, opponents conclude that there is a "world of difference" between firing and replacing a worker permanently,⁴⁵ and thus the *Mackay* doctrine is consistent with the intent of the NLRA.⁴⁶

These arguments fail to recognize that there is no distinction under the only relevant criteria, the terms of the NLRA. The NLRA states that the employer's actions *cannot* be "*construed so as to interfere with or impede or diminish in any way the right to strike.*"⁴⁷ Under this test, there is no practical difference in effect between firing and permanently replacing workers. "[I]n both instances the employee suffers loss of his job because he dared to exercise his statutory right to strike."⁴⁸ Professor Weiler has noted that

Comm. Hearings, supra note 3, at 169 (statement of Sen. Hatch); *id.* at 135 (statement of Peter G. Nash); S. REP. NO. 111, *supra* note 10, at 36; Westfall, *supra* note 8, at 143.

43. *Mackay*, 304 U.S. at 345-46; *NLRB v. Fleetwood Trailer*, 389 U.S. 375, 378-81 (1967); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *see also* *Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983) (outlining the difference between economic and unfair labor practices strikes); *OBERER ET AL., supra* note 36, at 501.

The reinstatement rights of permanently replaced strikers were recently diminished in *NLRB v. Delta-Macon Brick and Tile Co.*, 943 F.2d 567 (5th Cir. 1991). *Delta-Macon* involved a lay-off of permanent replacements after a down-turn in business. When business improved, the company began reinstatement from the pool of laid-off permanent replacements instead of the pool of replaced strikers. The court held that this preferential treatment of laid-off permanent replacements was not an unfair labor practice. *Id.* at 576.

44. *Aviation Comm. Hearings, supra* note 42, at 54.

45. *Id.*

46. *See* S. REP. NO. 111, *supra* note 10, at 37-39 (minority views on S.55).

47. *See* NLRA § 13, 29 U.S.C. § 163 (1988) (emphasis added).

48. *Striker Replacement Legislation: Hearing on H.R. 5 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 39-40 (1991) [hereinafter *Transportation Hearings*] (testimony of Lane Kirkland, President, A.F.L.-C.I.O.); *see also* S. REP. NO. 111, *supra* note 10, at 3-6; H.R. REP. NO. 57, *supra* note 10, at 11-13; Rona L. Pietrzak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87, 93 (1989) (arguing that "*Mackay* inadequately considered the scope of employee protection under the NLRA"); George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 382-89 (1969); Weiler, *supra* note 15, at 389-90.

Furthermore, permanent replacement of striking workers not only "entails a risk of derogation from the right to strike, [but also] may affect the free exercise of trade union

[a]lthough the law distinguishes the two actions based on the subjective intent of the employer, the employee may be excused for not perceiving a practical difference as far as his rights under section 7 are concerned. The bleak prospect of permanently losing his job is obviously likely to chill an employee's willingness to exercise his statutory right to engage in 'concerted activities.'⁴⁹

Any disparity between the rights of permanently replaced and fired workers to reinstatement and access to government benefits is immaterial and irrelevant to an analysis guided by the principles of the NLRA. Since management's use of permanent replacements does *impede and diminish* the statutory right to strike, the argument that the *Mackay* doctrine undermines the intent of the NLRA is justifiable.⁵⁰

The second way in which the *MacKay* doctrine undermines the intent of the NLRA is by circumventing the requirement of NLRB determination as to the representational status of a union.⁵¹ Lane Kirkland, President of the A.F.L.-C.I.O., argued in support of the Workplace Fairness Act, stating that use of permanent replacements "allows an employer to convert a dispute over what the terms of a particular collective bargaining agreement will be into a dispute over the future status of the union and over the collective bargaining relationship itself."⁵²

Mr. Kirkland's conclusion that an employer's use of permanent replacements converts a labor dispute into a struggle over the union's continued survival is supported by a number of studies. An Economic Policy Institute study found that "unions are anywhere from two and one-half to almost eleven times more likely to be decertified in strikes where permanent replacements are used."⁵³ In other words, in instances where permanent replacements are em-

rights." *ILO Body Questions U.S. Policy Regarding Permanent Replacement of Striking Workers*, Daily Lab. Rep. (BNA) No. 147, at A-6 (July 31, 1991), available in LEXIS, BNA Library, DLABRT File (quoting a report prepared by the ILO Governing Body's Comm. on Freedom of Association).

49. Weiler, *supra* note 15, at 390 (citing NLRA § 7, 29 U.S.C. § 157 (1988)).

50. See *infra* part III.A for a discussion of the multitude of negative effects that the use of permanent replacements has on a union worker's ability to exercise the right to strike. See also *infra* note 174 (discussing the Caterpillar strike).

51. See *supra* text accompanying notes 27-33.

52. *Transportation Hearings*, *supra* note 48, at 37 (emphasis added); see also Note, *supra* note 8, at 634.

It has also been argued that employer use of permanent replacements may be part of an overall strategy to break the union or otherwise create a union-free environment. S. REP. NO. 111, *supra* note 10, at 20-21; see also *Labor Comm. Hearings*, *supra* note 3, at 31 (discussing the increasing use of anti-union consulting firms). See *infra* notes 170-206 and accompanying text for a discussion on how increased use of permanent replacements and other unfair labor practices indicates an overall anti-union strategy.

53. See ECONOMIC POLICY INSTITUTE, *supra* note 15, at 20.

ployed, the union's chances of survival are only 40 percent, whereas when either temporary or no replacements are used, the union survival rate is between 98 to 100 percent.⁵⁴ A United Auto Workers survey examined 42 strikes in which employers used permanent replacements. The two most common resolutions were "union decertified," occurring in thirteen instances or 31 percent of the strikes, and "union accepted employer terms or significant concession," occurring in twelve instances or 29 percent of the strikes.⁵⁵

Given these results when an employer resorts to permanent replacement of striking workers, the *Mackay* doctrine "is an invitation to the employer . . . to rid himself of union adherents and the union."⁵⁶ As a result, the *Mackay* doctrine deviates from the policy intent of the NLRA: management's use of permanent replacements shifts the determination of a given union's representational status away from NLRB to the private determination of employers.

Finally, employer use of permanent replacements frustrates the expeditious settlement of labor disputes by encouraging conflict. Bernard DeLury, Director of the Federal Mediation and Conciliation Service (FMCS),⁵⁷ commented that use of permanent replacements

54. *Id.* at 35. This data caused Professor Cynthia Gramm, the author of the study, to conclude that "the use of permanent replacements hinders the survival of the bargaining relationship." *Id.*

55. *Labor Comm. Hearings, supra* note 3, at 218-21.

56. Schatzki, *supra* note 48, at 383; see also ATLESON, *supra* note 13, at 27; Weiler, *supra* note 15, at 390. "Thus, if an employer succeeds in mitigating the strike's economic impact by hiring a sizable cadre of permanent replacements, it can look forward to a possible end of the dispute through an NLRB-sponsored vote eliminating the union altogether." *Id.* (citing NLRA § 9(c)(3), 29 U.S.C. § 159(c)(3) (1982)).

57. The Federal Mediation and Conciliation Service (FMCS) is an independent agency which was created in 1947 as successor to the United States Conciliation Service. Labor Management Relations (Taft-Hartley) Act § 202, 29 U.S.C. § 172 (1988); see also WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 37-38 (1986). Congress directs that:

The [Federal Mediation and Conciliation] Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce.

29 U.S.C. § 173(b). Congressional policy favors FMCS participation in collective bargaining when such participation is necessary to facilitate voluntary agreements between labor and management: "[T]he settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements . . ." 29 U.S.C.S. § 171(b). However, under the rules of the FMCS, "[i]ntercession by a mediator on his own motion should be limited to exceptional cases." 29 C.F.R. app. § 1400 (1991). Between 1961 and 1981, the FMCS employed between 214 and 350 full-time labor mediators. SIMKIN & FIDANDIS, *supra*, at 38. For a general discussion of the role of mediation in the context of collective bargaining disputes, see

"exacerbates"⁵⁸ the settlement process:

There are times when we will help the parties get through the wages and the conditions and the benefits . . . only to still have the issue of what to do about permanent replacement workers still on the table. . . . [I]t is difficult to get rank-and-file members to ratify that agreement if they don't have any assurances of coming back to work. That's what I mean about exacerbating the process.⁵⁹

In addition to making settlement more difficult, use of permanent replacements entrenches conflict by protracting strikes.⁶⁰ An Economic Policy Institute study revealed:

[S]trikes last substantially longer when permanent replacements are hired than when temporary replacements are hired. Strikes also last longer when temporary replacements are hired than when no replacements are hired. The differences are fairly substantial. For example, in the U.S. sample, the mean duration of strikes in which permanent replacements were hired is 363 days. The mean duration when temporary replacements were hired was 72 days. When no replacements were hired, it was 64 days.⁶¹

This empirical evidence strongly indicates that employer use of permanent replacements adversely affects the continued survival of the union and the collective bargaining process itself by entrenching conflict.⁶² Since one of the principal goals of the NLRA is to minimize industrial strife by promoting healthy labor relations,⁶³ enactment of the Workplace Fairness Act would further the policy objectives of the NLRA by overturning the *Mackay* doctrine.

Opponents of the Workplace Fairness Act argue that the legislation would not promote healthy labor relations for several reasons. Senator Orrin Hatch - one of the most vigorous opponents of the

generally SIMKIN & FIDANDIS, *supra*. See also *infra* note 174 for a discussion of the role of the FMCS in a recent labor dispute between the United Auto Workers and Caterpillar, Inc.

58. Chief U.S. Mediator Says Use of Permanent Strike Replacements Makes Bargaining 'Difficult,' Daily Lab. Rep. (BNA) No. 203, at A-5 (Oct. 21, 1991), available in LEXIS, BNA Library, DLABRT File. As head of the federal agency whose mission it is to mediate the most entrenched labor-management disputes, Mr. DeLury is uniquely qualified to assess how the use or threatened use of permanent replacements effects contract negotiations or settlement once a strike commences.

59. *Id.*; see also S. REP. NO. 111, *supra* note 10, at 20-22; ECONOMIC POLICY INSTITUTE, *supra* note 15, at 53 (explaining how the permanent replacement of striking workers at the Androscoggin Mill in Jay hindered settlement); DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 229 (1970); Weiler, *supra* note 15, at 380.

60. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 36-37.

61. *Id.* at 36; see also S. REP. NO. 111, *supra* note 10, at 20-22.

62. While the use of permanent replacements usually protracts the length of a strike, it may also serve to shorten it, as in the case of the Caterpillar strike. See *infra* note 174.

63. See *supra* text accompanying notes 24-33.

Workplace Fairness Act - argued that passage of the bill "would likely mean an increased number of strikes, an increased risk of anti-competitive collective bargaining agreements, or both."⁶⁴ He asserted that healthy well-balanced labor relations would be ultimately enhanced by the defeat of the bill.

This argument is premised on at least two fallacious assumptions. Senator Hatch assumes that a decrease in the number of strikes necessarily should be interpreted as an indication of healthy well-balanced labor relations.⁶⁵ However, the following observations of two labor economists, regarding the decline of strikes in the 1980s, discredit this view:

[O]ccurring in a context of soaring profits and executive salaries and widening disparities of wealth, the decline in strikes neither signals growing social wellbeing nor foreshadows social peace. Indeed, the period of the 1920s and the early 1930s was also one of . . . declining strikes, and growing social disparities, and the period following it contained the greatest number of strikes . . .⁶⁶

In short, a decline in strikes may be symptomatic of healthy labor relations, but it may also characterize an imbalance in bargaining power: unions may be reluctant to strike because a strike, followed by an employer's resort to permanent replacements, may be suicide for the union.⁶⁷

Another assumption in Senator Hatch's argument is that elimination of the employer prerogative of permanent replacement would make collective bargaining agreements "anti-competitive."⁶⁸ While any attempt to evaluate the merits of Senator Hatch's bald assertion would require a detailed discussion beyond the scope of this article,⁶⁹ a preliminary assessment of the evidence suggests that his assertion is wrong. "All measures of profitability show that comparable U.S. firms operating in Canada without the *Mackay* rule are as profitable as American firms operating under *Mackay* in the United States."⁷⁰ Furthermore, several of our international competi-

64. S. REP. NO. 111, *supra* note 10, at 35.

65. For a similar argument, see Orley Ashenfelter & George E. Johnson, *Bargaining Theory, Trade Unions, and Industrial Strike Activity*, 58 AM. ECON. REV. 35, 35-41 (1969).

66. Keeran & Tarpinian, *supra* note 33, at 468; see also *infra* notes 151-56 and accompanying text (statistics indicating a dramatic drop in strikes in the 1980s).

67. See *supra* notes 174-76 and accompanying text, discussing evidence that an employer's use of permanent replacements often results in the destruction of the union.

68. S. REP. NO. 111, *supra* note 10, at 35.

69. For example, the discussion would have to compare the effects of permanent replacement laws in other countries and take into account such factors as the macro-legal structures (especially labor law), and the traditions and ethos of labor-management relations in those countries.

70. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 26-27 (citation omitted). This

tors, many of whom currently have the competitive advantage in their trade balance with the United States, have laws which limit or eliminate the use of permanent replacements in their country.⁷¹

Other evidence diminishing Senator Hatch's argument was set forth by labor economist William E. Spriggs.⁷² Spriggs asserts that the Workplace Fairness Act would actually benefit the United States competitively by fostering unionism, and he predicates his position on three findings:

1. Unions lower employee quit rates, achieving the work force stability that many regard as a key feature of Japanese economic success;
2. Workplace innovations such as quality circles are more likely to occur in union settings than nonunion settings; and,
3. Unions shift the composition of compensation packages toward fringe benefits, fostering an increase in pension funds and health care for those on pensions.⁷³

Spriggs concluded that "[a]s long as managers base their competitive strategies on low wages in an environment that makes breaking unions easy, they will avoid the more positive and productive path. Competition based on lowering wages and benefits is not a step forward into the new economic order, but a step backward."⁷⁴ Contrary to Senator Hatch's claims, the Workplace Fairness Act would be a positive force promoting peaceful and healthy labor-management relations.

2. *Restoring Judicial Limitation of the Mackay Doctrine.* Recent Supreme Court decisions have effectively expanded the *Mackay*

section of the study included the following statistics: "U.S. Non-Financial Firms' Sales in Canada as Percent of All Canadian Sales, 1966 to 1987," *id.* at 25; "Profit Margin of U.S. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987," *id.* at 26; "Return on Assets of U.S. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987," *id.* at 27; "Return on Net Worth of U.S. Firms in Canada Relative to U.S. Industry Norms by Selected Industries, 1987," *id.* at 28.

71. S. REP. NO. 111, *supra* note 10, at 29 (Germany, Japan, Canada, and France); Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 569-70 (1990) (Germany, Italy, France, and Canada). For examples of Canadian provincial laws prohibiting employer use of permanent replacements, see R.S.O., ch. 228, § 73 (1980); R.S.P.E.I., ch. L-1 (1974), *amended by* ch.39, 1987 P.E.I. Acts 1665; R.S.Q., ch. 41, § 98a (1977). See also PAUL C. WEILER, GOVERNING THE WORKPLACE 268 (1990) (observing that Ontario permits strikers to reclaim their jobs for up to six months after the beginning of the strike, even if replacements hired in the interim must be let go).

72. *Statements on Striker Replacement Legislation (H.R. 5) Delivered March 13 before the House Education & Labor Sub-Committee on Labor-Management Relations*, Daily Lab. Rep. (BNA) No. 50, at D-1 (Mar. 14, 1991), available in LEXIS, BNA Library, DLABRT File.

73. *Id.*

74. *Id.*

doctrine by negating or undermining historic judicial limitations on its use.⁷⁵ A case in point is the 1983 decision in *Belknap, Inc. v. Hale*,⁷⁶ which created an economic incentive for employers to refuse reinstatement of permanently replaced strikers following the cessation of strike activity. The employer in *Belknap* breached its promise to permanent replacements when it reinstated striking workers at the end of the economic strike.⁷⁷ The Supreme Court held that a state suit commenced by permanent replacements against the employer for breach of contract was not preempted by federal labor law.⁷⁸

The rule in *Belknap* has been criticized on at least two grounds. First, it gives greater meaning to the promise of permanency than actually exists. "In general, the employer cannot guarantee permanent status to the replacements it hires, for there is nothing permanent in such indefinite, nonunion 'employment at will,' subject as it is not only to layoffs for business reasons, but also to dismissal at the employer's discretion."⁷⁹ Similarly, Judge Learned Hand observed that "it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold."⁸⁰

Belknap is also criticized for making settlement of strikes more difficult. In particular,

[i]f the union "wins" the strike, an employer may nevertheless be reluctant to reinstate strikers lest it become liable to the replacements. As the strike drags on an employer may prefer offering reinstatement conditioned upon concessionary contract terms but hesitate for fear of inciting a suit by the replacements. . . . Under any scenario if the reinstatement of strikers becomes the union's bottom line in resolving a strike, *Belknap* provides a rationale or crutch for resisting, thereby prolonging a strike.⁸¹

75. See H.R. REP. NO. 57, *supra* note 10, at 14, 16-17 (pt.3); S. REP. NO. 111, *supra* note 10, at 7, 9-10; Finkin, *supra* note 71, at 549-66 (arguing that both recent Supreme Court and NLRB decisions have expanded the employer's *Mackay* doctrine prerogative); see also James B. Atleson, *The Prospects for Labor Law Reform*, 18 POL'Y STUD. J. 364, 368-71 (1989) (arguing that the Supreme Court's perception that unions are weakened has increasingly encouraged the Court to construe the NLRA against the interests of labor).

76. 463 U.S. 491 (1983).

77. *Id.* at 500.

78. *Id.* "[W]hen an employer attempts to exercise . . . [its] privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued." *Id.*

79. Weiler, *supra* note 15, at 391-92.

80. NLRB v. Remington Rand, Inc., 94 F.2d 862, 871 (2nd Cir. 1938); see also Estreicher, *supra* note 38, at 294.

81. Speech Delivered by Union Attorney Jonathan Axelrod at American Bar Association's Mid-Winter Meeting in Phoenix, Ariz., Daily Lab. Rep. (BNA) No. 44, at F-1 (Mar. 6, 1991), available in LEXIS, BNA Library, DLABRT File [hereinafter *Axelrod*].

The *Mackay* doctrine was further reinforced by the 1989 decision in *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*,⁸² which weakened the precedent set in *NLRB v. Erie Resistor Corp.*⁸³ In *Erie Resistor*, the employer offered twenty years of super-seniority to "crossovers"⁸⁴ and replacements as a "credit against future layoffs" and as a means of attracting them to work during the union's economic strike.⁸⁵ The Court ruled that the NLRB was entitled to find that this super-seniority scheme constituted "conduct which carried its own indicia of intent and which is barred by the [NLRA] . . ."⁸⁶ The Court reasoned that the super-seniority scheme would create long-lasting animosity between returning strikers and replacements and that the scheme "by its very terms operat[ed] to discriminate between strikers and nonstrikers, both during and after a strike."⁸⁷ The Court also explicitly noted that it was "not prepared to extend" the *Mackay* doctrine to allow the employer's tactics in that case.⁸⁸

Speech]; see also S. REP. No. 111, *supra* note 10, at 9-10; *Belknap*, 463 U.S. at 531-532 (Brennan, J., dissenting) (arguing that the majority rule in *Belknap* will discourage settlement of labor disputes); H.R. REP. No. 57, *supra* note 10, at 17; Finkin, *supra* note 71, at 550-556 ("[B]y giving an assurance of permanence, the employer will have significantly obstructed if not totally frustrated any bargaining for the reinstatement of strikers."); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 302 (1991); Kevin J. Fay, Comment, *Strikebreakers, The Supreme Court, and Belknap, Inc. v. Hale: The Continuing Erosion of Federal Labor Preemption*, 33 BUFF. L. REV. 839, 866-67 (1985); *supra* notes 56-69 and accompanying text (discussing that an employer's resort to permanent replacements adversely affects the prospects of settling a labor-management dispute).

82. 489 U.S. 426 (1989).

83. 373 U.S. 221 (1963).

84. A "crossover" is a striking worker who defects from the strike activity and returns to work. *Trans World Airlines*, 489 U.S. at 430.

85. *Erie Resistor*, 373 U.S. at 223.

86. *Id.* at 231. Normally, a finding of intent is required because the NLRA prohibits an employer from *intentionally* discriminating against workers who engage in protected concerted activity such as a strike. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988). However, under certain circumstances, such as those in *Erie Resistor*, proof of employer intent (or animus) is not required because the practices at issue are deemed to be so destructive of an employee's rights, guaranteed under the section 7 of the NLRA, that they "carry their own indicia of intent." 373 U.S. at 231. The *Erie Resistor* Court noted that certain unfair labor practices may be saved from illegality by an "overriding business purpose justifying the invasion of union rights," *id.*, but neither the Court nor the NLRB found any such overriding business purpose in that case. For a complete discussion of the intent requirement for unfair labor practices determinations, see *infra* notes 181-202 and accompanying text.

87. *Erie Resistor*, 373 U.S. at 231.

88. *Id.* at 232. The Court in *Erie Resistor* was willing to assume that the employer in that case acted in good faith and for the same reasons that the employer in *Mackay* did. *Id.* at 236-37. Ironically, however, despite its finding of similar motive and intent, the Court found that the conduct of the Erie Resistor Co. (offering striker replacements su-

Notwithstanding its prior holding in *Erie Resistor*, the Supreme Court held in *Trans World Airlines* that junior strikers could in effect be enticed to crossover with the knowledge that the employer would not displace them when full-term senior strikers returned, even though the junior workers had lower seniority.⁸⁹ The union argued that *Erie Resistor* was controlling since it prohibited employer incentive schemes which were predicated upon offering super-seniority.⁹⁰ The Court rejected this argument on the grounds that the facts of *Trans World Airlines* were distinguishable: "once reinstated, the seniority of full-term strikers is in no way affected by their decision to strike," whereas, in *Erie Resistor*, the super-seniority scheme continued even after all the workers returned.⁹¹

The distinction drawn by the majority in *Trans World Airlines*, that the super-seniority scheme used by Trans World Airlines did not have lingering effects once full-term senior strikers were reinstated, belied the facts of that case. As the union in *Trans World Airlines* argued in its brief,

desirable job assignments and domiciles that would have been occupied by the most senior flight attendants had there been no strike will continue to be held by those who did not see the strike through to its conclusion. For example, the senior full-term striker who worked in the Los Angeles domicile before the strike may have been replaced by a junior crossover. As poststrike vacancies develop in TWA's work force, permitting reinstatement of full-term strikers, they are not likely to occur in the most desirable domiciles. Thus, it is unlikely that the senior full-term striker would be reinstated back to her preferred domicile.⁹²

Given the lingering effects the super-seniority scheme would have on choice of job assignments and domicile, proponents of the Workplace Fairness Act reject the distinction drawn by the Supreme Court in *Trans World Airlines*. They argue instead that the reasoning and result are anomalous and weaken the historic judicial limitations of the *Mackay* doctrine represented by *Erie Resistor*.⁹³

per-seniority) was an unfair labor practice, *id.* at 231, even though the Court had found the employer practices in *Mackay* (using permanent replacements) to be acceptable, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). This distinction, whereby the employer is allowed to permanently replace workers, but is not allowed to use less severe measures prompted two scholars to note: "It is as though the law permits killing but not wounding." GETMAN & POGREBIN, *supra* note 32, at 141.

89. *Trans World Airlines*, 489 U.S. at 438.

90. *Id.* at 436.

91. *Id.* at 435. The Court also explicitly noted that, even though it was applying the Railway Labor Act, its determination would have been the same under the NLRA. *Id.* at 439-42.

92. *Id.* at 436.

93. See *Transportation Hearings*, *supra* note 48, at 43 (testimony of Lane Kirkland); S. REP. NO. 111, *supra* note 10, at 10; H. REP. NO. 57, *supra* note 10, at 16-17; Finkin, *su-*

3. *Rectifying the Imbalance in Available Economic Weapons.*⁹⁴ *Trans World Airlines* and *Belknap* erode the historic judicial limitations of the *Mackay* doctrine and reinforce the viability of an employer's use of permanent replacements.⁹⁵ The effects of these decisions are made even more potent by the imbalance in economic weapons available to management and labor.⁹⁶

Since *Mackay Radio* was decided, unions have lost the right to engage in most forms of peaceful secondary activity and they have lost the right to obtain commitments of strike solidarity. These developments have substantially enhanced management's power to use permanent replacements with far greater effectiveness. During the same period, employers also were given new weapons, including the right to lock out the union offensively even prior to impasse.⁹⁷

Professor Weiler argues that "the most crucial legal imbalance in collective bargaining law [is that] the employer is permitted to continue operating during a strike by hiring permanent replacements, whereas the union is barred from asking other unionized workers to stop helping their employers carry on business as usual with the struck employer."⁹⁸

pra note 71, at 557.

94. The term "weapon" refers to any activity, counter-measure, or strategy (e.g. strike, lock-out, boycott, etc.), used by management or labor to inflict some measure of economic harm on the other party as a means to gain a more powerful negotiating position for the purposes of collective bargaining. For example, in *Trans World Airlines*, 489 U.S. at 438, Justice O'Connor described the employer actions at issue in that case as "fairly within the arsenal of economic weapons available to employers during a period of self-help." See also S. REP. NO. 111, *supra* note 10, at 28 (referring to the employer's use of an offensive lockout as a "weapon"); CHARLES R. PERRY ET AL., OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS 123-24 (The Wharton Sch. Labor Relations & Pub. Policy Series No. 23, 1982) (terming use of permanent replacements "a weapon").

95. See *supra* text accompanying notes 75-93.

96. Professor Weiler points out that "[t]he real flaw in the law of collective bargaining lies not in its hands-off posture toward the substantive content of the agreement, but in the way it defines and limits the weapons available to both sides in pressing their bargaining goals. The balance is skewed." Weiler, *supra* note 15, at 405.

97. S. REP. NO. 111, *supra* note 10, at 28; see also NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1988); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 115-16 (1985); H.R. REP. NO. 57, *supra* note 10, at 32.

98. Weiler, *supra* note 15, at 387. See generally GETMAN & POGREBIN, *supra* note 32, at 245-55 (outlining the difference between permissible primary boycotting and prohibited secondary boycotting).

The reduction in the union's bargaining strength due to the imbalance in available economic weapons becomes even more exacerbated in contexts where striking workers are already disadvantaged in the labor market. Weiler, *supra* note 15, at 387, 394; Schatzki, *supra* note 48, at 384. Professor Schatzki observed:

The real effect of the doctrine is to give greater strength to those employers who least need it, and to permit those employers to rid themselves of union em-

The enervation of the union's power due to the imbalance in available weapons is made worse by limitations placed on a union's ability to enforce internal solidarity.⁹⁹ For example, in *Pattern Makers' League v. NLRB*,¹⁰⁰ the Supreme Court determined that a union may not use disciplinary sanctions to deter a union member from defecting from a strike.¹⁰¹ This ruling enhanced the effectiveness of the employer's arsenal to resist a strike while the union was stripped of an important means of enforcing solidarity and strength-

ployees and the union. For example, it is unlikely that an employer of unskilled labor could not find temporary replacements for striking employees in a community with a large unemployed population.

Id. Use of permanent replacements also reduces the chances that a newly organized bargaining unit will win a first contract. Weiler, *supra* note 15, at 390.

99. The union's power is also diminished by increased deregulation of the right of non-employee union organizers to solicit unorganized workforces. A case on point is the Supreme Court decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), which involved non-employee union organizers who had attempted to solicit employees of Lechmere, Inc. Lechmere was a store located in a plaza in a large metropolitan community, and the union attempted to place handbills on the windshields of employee automobiles parked in the plaza parking lot owned by Lechmere. *Id.* Lechmere's management stopped the union from soliciting on its parking lot, and the union filed an unfair labor practice complaint with the NLRB. *Id.* Both the ALJ and the Board found that the employer committed an unfair labor practice when it refused to allow the union access to the employees' automobiles, and the First Circuit affirmed. *Id.*

The Supreme Court granted *certiorari*, reversed the First Circuit, and denied enforcement of the NLRB order. *Id.* at 850. Central to the Court's analysis was a distinction drawn between the rights of employee and non-employee union organizers. *Id.* at 845. While employee union organizers were subject to greater protection, the rights of non-employee organizers were more circumscribed. *Id.* at 848-49. Non-employee organizers could trespass on the employer's property only in situations where access to employees was otherwise all but impossible. *Id.* at 849-50. In his first significant majority opinion as a Supreme Court Justice, Clarence Thomas held that "[s]o long as non-employee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place." *Id.* at 848. Thus, if the employees were lumberjacks living in a logging community, the Court was willing to allow trespass by non-employee union organizers since there was no other reasonable means of access. *Id.* at 849 (citing *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948)). However, Justice Thomas held that the union did have "reasonable access" in the *Lechmere* case because union organizers could hold up placards advising employees of the benefits of union membership from a grassy section of public land located between Lechmere's parking lot and the public highway. *Id.* at 849-50.

For more information on the *Lechmere* case and how it represents a judicial deregulation of federal collective bargaining rights, see generally Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 585 (1992).

100. 473 U.S. 95 (1985).

101. *Pattern Makers' League*, 473 U.S. at 115-16; see also *NLRB v. Textile Workers Union, Local 1929*, 409 U.S. 213 (1972) (holding that unions may not enforce rules or agreements on bargaining unit solidarity against those who resign during strike in order to cross picket lines).

ening the strike. One author has commented that these developments signal "the Court's willingness to weigh the union's need to maintain solidarity during a strike less heavily in a balance with competing policies."¹⁰² Similarly, the Senate Committee on Labor and Human Resources noted that

each of these changes has enhanced the ability of an employer to use the *Mackay Radio* doctrine, and has redounded to the disadvantage of unions. . . . [T]he law's gradual sapping of union strength has made the use of permanent replacements a far more attractive option for employers to pursue today than it has been in years past.¹⁰³

The imbalance in available economic weapons and the limitations on a union's ability to enforce internal solidarity have been effectuated in part through the use of dual strands of reasoning. When evaluating the legitimacy of union and management conduct, courts will use one strand of reasoning to deem the union conduct illegal and another to find management conduct acceptable.¹⁰⁴ Professor Weiler commented on the Court's failure to apply parity of reasoning:

Suppose it is agreed that the law should leave the employer free to replace striking employees, to try and operate the business during a strike if it can. Understandably the trade union will assert that the law must take the same *laissez-faire* attitude toward its own efforts to frustrate that employer endeavor.¹⁰⁵

One case exemplifying the dualistic reasoning of the courts is *NLRB v. Teamsters Local 449 (Buffalo Linen)*,¹⁰⁶ in which the Supreme Court was quick to point out that an employee has a right to defect from a strike and crossover as part of the statutory right to "refrain from any or all of such activities."¹⁰⁷ However, the Court loses sight of this right when its application would detract from the employer's effective use of a lockout: "Individual locked out employees have no comparable right to refrain from union activities. Employees are locked out of work and locked into the union's bargaining position regardless of whether they support or oppose it!"¹⁰⁸ In

102. Finkin, *supra* note 71, at 556. The competing policies referred to by Professor Finkin are "individual liberty vis-a-vis the collectivity." *Id.*

103. S. REP. No. 111, *supra* note 10, at 15.

104. Axelrod *Speech*, *supra* note 81.

105. PAUL WEILER, *RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW* 78 (1980).

106. 353 U.S. 87 (1957).

107. *Id.* at 96. *Accord* Pattern Makers' League v. NLRB, 473 U.S. 95, 96 (1985) (unions may not discipline an employee for refraining from the union's strike activity or becoming a crossover).

108. Axelrod *Speech*, *supra* note 81. Axelrod notes that this rule compels individual

short, the Court emphasizes the *collective quality* of the union workforce to the benefit of the employer in the case of the employer lockout, but emphasizes the *individual quality* of the union workforce (i.e., the individual right not to participate in union activities) to the detriment of the union in the case of a strike.

Another case in which the Supreme Court used dual strands of reasoning is *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*.¹⁰⁹ Justice O'Connor, in language equating the statutory right to strike with a "gamble,"¹¹⁰ explained why the Court would not allow full-term senior strikers to displace those junior workers who returned to work before the strike ended (crossovers):

We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements, and "who rank lowest in seniority," to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.¹¹¹

However, nowhere in Justice O'Connor's majority opinion is it indicated that if a strike was successful¹¹² it would be proper to withhold the benefits of the successful "gamble" (higher wages and greater benefits) from those workers who chose not to take the gamble and go on-strike.

In sum, the Court in *Trans World Airlines* equated the strike to a gamble when a risk-benefit analysis would benefit the employer. This was the case when the Court determined that junior crossovers should not lose their position when full-term senior strikers returned.¹¹³ But when equating a strike to a gamble would flesh out a risk-benefit analysis so as to strengthen the perceived efficacy of

employees to "rely upon collective action and inherently destroys the vestige of individual rights." *Id.* See generally James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 856-67 (1985) (exploring how economic "power imbalances also affect the ability of labor and employees to communicate and express views" under the First Amendment).

109. 489 U.S. 426 (1989).

110. *Id.* at 438-39. Professor Weiler commented:

[T]here is an interesting comment by Justice O'Connor in . . . *TWA*, where she refers to going on strike as a gamble; that employees bet their jobs when they go on strike, and if they lose, don't come to the labor board, don't come to the judiciary asking for help. Now, that is a very strange, peculiar notion of a right, that it is simply a gamble.

Labor Comm. Hearings, *supra* note 3, at 84.

111. 489 U.S. at 438 (citation omitted).

112. "Successful" meaning that the union won wage increases and benefits which the employer had refused to grant prior to the strike.

113. 489 U.S. at 438.

union activity, then the gambling frame of reference was abandoned: the Court never hints that it would consider withholding wage increases to individuals who did not participate in strikes.¹¹⁴

The imbalance in available economic weapons, coinciding with increasing limitations on a union's ability to enforce internal solidarity, further supports the argument for passage of the Workplace Fairness Act. As the Senate Committee on Labor and Human Resources noted, "unions now have far fewer rights to counteract effectively an employer's use of permanent replacements."¹¹⁵ Eliminating an employer's prerogative to permanently replace striking workers may remedy the imbalance by equalizing the arsenal of available economic weapons. "In short, passage of [the Workplace Fairness Act] will help to restore, not upset, the desired 'delicate balance' in relative bargaining power."¹¹⁶

4. *The Mackay Doctrine is Predicated on Invalid Assumptions.* Finally, the *Mackay* doctrine should be overturned because it is predicated on invalid assumptions. First, the *Mackay* doctrine assumes that the employer has an inalienable right to operate and hire replacements during a strike. Various scholars have argued that such an assumption emanates from unsupported a priori notions concerning management prerogatives.¹¹⁷ Professor Atleson has concluded that "[t]he long tenure of *Mackay*, the impossibility of rationalizing the holding, and the hopelessness with which labor law scholars view the opportunity for revision, suggest the doctrine is based on some deep-seated notion of employer prerogatives and rights."¹¹⁸

114. The Court's failure to apply parity of reasoning is highlighted to demonstrate that the Workplace Fairness Act is a necessary first step in rectifying an imbalance in economic weapons effectuated in part through the use of dualistic reasoning. The dualistic reasoning of the Court is not fleshed out in an attempt to intimate that differential wages should be allocated based upon participation in strikes.

115. S. REP. NO. 111, *supra* note 10, at 15.

116. *Id.* at 28.

117. ATLESON, *supra* note 13, at 32-34. Professor Getman would describe this assumption as a product of the "capitalist exemption." ECONOMIC POLICY INSTITUTE, *supra* note 15, at 64. Getman describes this exemption as instances in which "the courts build in the notion that it's the employer's property and use that notion to abrogate union rights." *Id.*

Lochner v. New York, 198 U.S. 45 (1905), epitomizes the use of a priori notions of management prerogative. In *Lochner*, the Supreme Court struck down a New York law which prohibited the employment of bakery workers for more than 10 hours per day or 60 hours per week. The Court held that the law was not a health law, but instead an "illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts." *Id.* at 61.

118. ATLESON, *supra* note 13, at 32.

The doctrine also creates an irrebuttable presumption that absent the prerogative of using permanent replacements, an employer would be effectively precluded from realizing its presumed right to operate during a strike.¹¹⁹ This irrebuttable presumption takes the form of a failure, on the part of the courts, to consider whether the offer of a *permanent* position was necessary in order for the employer to attract sufficient numbers of workers to operate the business during a strike.¹²⁰ Contrary to this irrebuttable presumption, the empirical evidence unequivocally demonstrates that an employer may adequately run its operations during a strike with only *temporary* replacements.¹²¹ Overturning the *Mackay* doctrine through passage of the Workplace Fairness Act will end improper judicial application of this inaccurate presumption.¹²²

II. CHANGES IN MANAGEMENT'S BEHAVIOR REGARDING PERMANENT REPLACEMENT WORKERS

Prior to the 1980s, management usually chose not to operate during a strike. To the extent that management would operate it could usually meet its basic needs through the use of in-house personnel. If, as a last resort, management chose to use replacements,¹²³ they would rarely use permanent replacements,¹²⁴ and actually pre-

119. *Transportation Hearings*, *supra* note 48, at 48; Weiler, *supra* note 15, at 391; Hal Keith Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 790 (1972) ("it has often been assumed that the carrot of permanency is necessary if the employer is to acquire replacements").

120. For some examples of the failure of the courts to address the issue of whether there was a legitimate business justification for offering replacements a permanent position instead of a temporary position, see *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Delta-Macon Brick and Tile Co.*, 943 F.2d 567 (5th Cir. 1991); *Waterbury v. NLRB*, 950 F.2d 849 (2nd Cir. 1991).

121. PERRY ET AL., *supra* note 94, at 51-68 (demonstrating that use of internal non-striking personnel and temporary replacements are sufficient to run a plant during a strike); see also *infra* part II.B.

122. Discussion of the evidence of an employer's ability to operate during strikes, *infra* notes 133-38 and accompanying text, as well as how the unnecessary and persistent use of permanent replacements illustrates management's increasingly blatant expression of anti-union attitudes, will be developed below, see *infra* part III.

123. PERRY ET AL., *supra* note 94, at 63-66. "The hiring of replacements for bargaining-unit employees . . . was not an integral element in the operating plans of most of the firms studied." *Id.* at 63; see also Gillespie, *supra* note 119, at 790-91.

124. PERRY ET AL., *supra* note 94, at 68. "Most [firms] continue to view the hiring of outside replacements, particularly permanent replacements, as an option to be exercised only in *unusual cases*, and even then more with a view toward breaking an impasse than breaking a strike." *Id.* (emphasis added).

ferred temporary replacements.¹²⁵ Moreover, management's ability to attract sufficient numbers of temporary replacements was not hindered by its failure to offer these replacements a permanent position.¹²⁶

However, starting in the early 1980s, management has manifested increasing hostility towards the very existence of organized labor. In particular, management has tuned into *Mackay Radio*, which otherwise had been standing essentially unused since its birth in 1938. Accordingly, during the 1980s and early 1990s, management has increasingly used, threatened to use, and had the propensity to use permanent replacements, a drastic change from the period prior to 1980 when use of permanent replacements was rare.¹²⁷

A. *The Rare Use of Permanent Replacements Prior to the 1980s*

A study conducted by the University of Pennsylvania's Wharton School of Business (Wharton Study) demonstrated that management reluctance to use permanent replacements was grounded in two fears. First is the fear of failure, of management not being able to run the plant during a strike,¹²⁸ and second is the fear of confrontation with strikers, of violence on the picket line and long-lasting animosity after a strike ended.¹²⁹ Additionally, "employers were restrained by a desire to maintain an image as corporate 'good-citizens.' . . . Managers tended to have long-term ties to their community and would have had to live with the divisions that the use of permanent replacements could cause."¹³⁰

Verifying the existence of these fears and finding methods to dispel them was one of the primary goals of the Wharton Study.¹³¹

125. *Id.* at 64.

126. *Id.* at 64-65; see also *infra* notes 141-46 and accompanying text.

127. See S. REP. NO. 111, *supra* note 10, at 7-8; H.R. REP. NO. 57, *supra* note 10, at 14-15; Herbert R. Northrup, *Foreword* to CHARLES R. PERRY ET AL., *supra* note 94, at iii-iv; U.S. GENERAL ACCOUNTING OFFICE, LABOR MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970S AND 1980S, H.R. DOC. NO. 2, 102d Cong., 1st Sess. 1 (1991) [hereinafter GAO REPORT]; ECONOMIC POLICY INSTITUTE, *supra* note 15, at 33-40.

128. PERRY ET AL., *supra* note 94, at 42.

129. *Id.* at 42-43.

130. S. REP. NO. 111, *supra* note 10, at 8; see also PERRY ET AL., *supra* note 94, at 1 ("plant operation is not institutionally popular" because of consequences stemming from resulting union antipathy).

131. PERRY ET AL., *supra* note 94, at 2-3, 37-40 (explaining the use and usefulness of plant operation during a strike); *id.* at 42-43 (explaining that fears will be reduced through planning).

The Wharton study seeks to enlighten the business community concerning the benefits of continued plant operation during a strike. It is possible that the study was

The study determined that, to the extent that some employers planned for the use of replacements and ultimately used them, they would lose their inhibiting fears and would become increasingly "addicted" to the use of replacements.¹³² Accordingly, the Wharton Study effectuated its goal of reducing employer fears by teaching management how to rationalize plant operation during a strike.¹³³

For the purposes of this article, the crucial point of the Wharton Study is that, almost 40 years after the *Mackay* doctrine was established, plant operation during a strike was still a "relatively new phenomenon," and the use of replacements in that context was "rather unique,"¹³⁴ as well as "difficult and unpopular."¹³⁵ The authors concluded:

Although the right to operate during strikes provides employers with a weapon to augment their right to take a strike in the conduct of collective bargaining, to date that weapon has only seldom been used; it has not become a basic part of the American system of collective bargaining. . . .

....

Plant operation is a departure from the norm in union-management relations. As such, it represents a clear escalation of conflict and power by management in its relationship with a union.¹³⁶

The Wharton Study does not stand alone in its conclusion. A study released by the General Accounting Office (GAO) in January of 1991 compared the perceptions of employers and union representatives, asking them if they believed replacements were hired less often in the late 1970s than in the late 1980s.¹³⁷ The GAO reported that "45 percent of the employers believe permanent replacements were hired less often in the period 1975 to 1980 and about 77 percent of the union representatives believe they were hired less."¹³⁸

motivated, at least in part, by the funding sources which would benefit from this research:

Research for [the Wharton study] was financed by generous grants from the J. Howard Pew Freedom Trust in support of the Labor Relations and Public Policy Series, by grants from the Gulf, Rollin M. Gerstacker and A.O. Smith foundations, by Mobil Oil Corporation, and by membership contributions from the ninety-five corporations that constitute the Industrial Research Unit's Research Advisory Group.

Herbert R. Northrup, *Foreword to PERRY ET AL.*, *supra* note 94, at v.

132. *Id.* at 41-43. "The records of the firms studied suggest that plant operation may be addictive." *Id.* at 41.

133. *Id.* at app. (providing step-by-step guidelines on how to plan for continued plant operation during a strike).

134. Herbert R. Northrup, *Foreword to PERRY ET AL.*, *supra* note 94, at iii.

135. PERRY ET AL., *supra* note 94, at 125.

136. *Id.* at 123-24.

137. GAO REPORT, *supra* note 127, at 18.

138. *Id.*

A study of strikes by Professor Cynthia Gramm also corroborates the Wharton Study.¹³⁹ Gramm stated:

I asked managers who indicated there had been past strikes involving the same bargaining unit whether they had ever hired replacement workers during past strikes. Every single manager said that this particular strike was the first attempt to hire replacement workers. The strategy appears to be a new experience for the firms in the sample. The incidence of this strategy may be increasing relative to previous bargaining rounds.¹⁴⁰

The findings of these three studies and their similar conclusions provide clear and compelling evidence that, prior to the 1980s, management rarely used permanent replacements during an economic strike.

B. *The "Carrot" of Permanence is not Needed to Attract Sufficient Numbers of Replacements*

The Wharton Study determined that, to the extent that management would attempt to operate during a strike, it could do so effectively with supervisors and non-union workers.¹⁴¹ When management could not achieve a minimum operating level with just this "in-house" help, temporary replacements offered an effective alternative. The Wharton Study confirmed that use of temporary replacements was preferred over permanent replacements prior to the 1980s.¹⁴²

The Wharton Study also found that, contrary to management's expectations, temporary replacements were readily available. "All of the firms that sought outside replacement labor reported surprising success in that search in terms of the number of applications received and the number of applicants willing to cross a picket line to

139. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 33-49. For further detailed discussion of Professor Gramm's study see *infra* notes 160-167 and accompanying text.

140. *Id.* at 34-35 (emphasis added).

141. PERRY ET AL., *supra* note 94, at 51-68. In a chapter entitled *Logistics of Operation: Manpower*, Dr. Perry explains:

The most readily available supply of potential replacement workers willing to cross a picket line to work a seven-day, twelve-hour schedule is a company's own managerial and supervisory employees. *This pool of labor generally is the preferred and primary source of replacement labor among firms that operate during strikes.* In most of the companies studied, this pool has provided a sufficient, if not always ample, supply of labor to meet initial operating.

Id. at 54 (emphasis added); see also Gillespie, *supra* note 119, at 790-91.

142. PERRY ET AL., *supra* note 94, at 64. "Most of those firms . . . consciously avoided the use of permanent replacements either by explicitly stating that they were hiring only temporary replacements or by being silent on the subject of whether replacements were temporary or permanent." *Id.*

file applications, even when that was unnecessary."¹⁴³ Indeed, there appears to be no shortage of persons willing to provide help during a strike, especially during the recessionary times of the early 1990s: during a recent strike against the New York Daily News, the newspaper received 13,000 applications to replace the 3,000 striking workers.¹⁴⁴

Contemporary employment trends provide further support for the contention that employers do not need to offer replacement workers a permanent position. In the current labor market there is an increasing use of temporary or casual labor.¹⁴⁵ As noted by the United Auto Workers (UAW) in a prepared statement supporting passage of the Workplace Fairness Act, the use of temporary employees is an accepted and expanding method of doing business:

A 1987 survey by the Administrative Management Society found that 90 percent of the companies surveyed used temporary help. According to the major authority in this area, from 1980 to 1988 the temporary workforce grew 175 percent from 400,000 to 1.1 million workers. If part-time and other contingent workers are included, a conservative estimate puts the overall contingent workforce at 29.9 million workers—roughly 25 percent of the total civilian labor force of 121.7 million workers.¹⁴⁶

Since employers were able to effectively operate during strikes prior to the 1980s without resorting to use of permanent replacements, and since the current labor market and contemporary employment trends indicate that employers have increased their use of temporary workers, employers do not need to offer a permanent position in order to attract sufficient numbers of temporary replace-

143. *Id.* at 65. The study found that at least one firm preferred temporary over permanent replacements because "turnover among these disdained classes of workers [the permanent replacements] tended to be high in the months following the end of the strike," due to harrassment. *Id.* at 66; see also Gillespie, *supra* note 119, at 790. Gillespie notes that the *Mackay* doctrine "owes its firm entrenchment in the law to the lack of any clear disproof of its assumption that employers must hire permanent replacements to protect and continue their businesses." *Id.* at 788.

144. Randall Samborn, *Replacements Spur Labor Action*, NAT'L L.J., May 28, 1990, at 1. "The Daily News has received 13,000 applications to fill 3,000 union jobs, and 'that does more to prevent a strike than create one,' [said] John Sloan, the newspaper's vice president of human resources." *Id.*

145. *Labor Comm. Hearings*, *supra* note 3, at 209 (statement of Owen Bieber, President, International Union, UAW).

146. *Id.* (footnote omitted) (citing RICHARD BELOUS, *THE CONTINGENT ECONOMY; THE GROWTH OF THE TEMPORARY, PART TIME & SUBCONTRACTED WORKFORCE* (National Planning Association 1989)). This conclusion is supported by evidence from other industrialized countries. In Canada, where use of permanent replacements is strictly limited or prohibited, employers have not had difficulty in recruiting replacements. *The Issue of Strike Replacements: Hearings on H.R. 4552 Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 47, 67 (1988) (testimony of Canadian labor law scholar).

ments. Instead, the facts clearly show that employers can adequately fill positions by offering prospective applicants only a temporary position. Depriving management of its *Mackay* doctrine prerogative (use of permanent replacements) by passing the Workplace Fairness Act will not significantly hinder management's ability to run its operation during a strike.

C. *Increased Actual and Threatened Use of Permanent Replacements in the 1980s and Early 1990s*

Results from four studies strongly suggest that use of permanent replacements has increased since the 1980s.¹⁴⁷ During 1990, the United States General Accounting Office (GAO) conducted a study entitled *Strikes and the Use of Permanent Strike Replacements in the 1970's and 1980's*. The study relied principally upon two sources: a questionnaire which ascertained the perceptions of management and union leaders,¹⁴⁸ and data furnished by the Federal Mediation and Conciliation Service (FMCS).¹⁴⁹

The GAO findings demonstrate that use of permanent strike replacements is no longer the rare phenomenon described by the Wharton Study.¹⁵⁰ As a preliminary matter, the GAO found that there was a 53% decline in the overall number of strikes in the 1980s as compared to the 1970s;¹⁵¹ the greatest decline (80%) occurred between 1979 and 1983 with 2,897 strikes in 1979 and only 647 strikes in 1983.¹⁵² In 31% of the strikes in 1985, and in 35% of the strikes in 1989, employers threatened to use permanent re-

147. GAO REPORT, *supra* note 127; ECONOMIC POLICY INSTITUTE, *supra* note 15, at 33-40 (Gramm Study); DEP'T OF EMPLOYEE BENEFITS, A.F.L.-C.I.O., *THE PERMANENT REPLACEMENT OF WORKERS STRIKING OVER HEALTH CARE BENEFITS IN 1990* (1991); *Labor Comm. Hearings*, *supra* note 3, at 218-21 (UAW survey); see also S. REP. NO. 111, *supra* note 10, at 10-13; H.R. REP. NO. 57, *supra* note 10, at 17-20.

148. GAO REPORT, *supra* note 127, at 3, 18-20. In particular, the GAO relied upon this source for an overall indication of perceived use of permanent replacement in the 1970s and 1980s. *Id.* The GAO's findings based on this data are discussed at *infra* notes 150-159 and accompanying text.

149. GAO REPORT, *supra* note 127, at 2, 12-18. In particular, data from the Federal Mediation and Conciliation Service was used to ascertain information concerning the following: (1) the number of strikes in the 1970s and 1980s; (2) threatened use of permanent replacements in 1985 and 1989; (3) when the threat occurred, i.e. before or after strike started; (4) actual use of permanent replacements in 1985 and 1989 as a percentage of the total number of strikes; (5) duration of strike when permanent replacements were used; (6) number of employees, as a percentage of the workforce, permanently replaced in 1985 and 1989; and (7) the comparative use of permanent replacements by small and large firms. *Id.*

150. Herbert R. Northrup, *Foreword* to PERRY ET AL., *supra* note 94, at iii.

151. GAO REPORT, *supra* note 127, at 12.

152. *Id.*

placements,¹⁵³ and employers actually hired permanent replacements in about 17% of all strikes in both years.¹⁵⁴ The 17% figure represents about 4% of the total number of strikers,¹⁵⁵ or 14,000 individuals.¹⁵⁶

The GAO observed that its figures were probably *lower* than the actual occurrences since the FMCS data only included strikes by unions and employers covered by the NLRA.¹⁵⁷ Thus "strikes at TWA, Continental, Alaska Airlines, Eastern, and other airlines in which permanent replacements were hired, were not . . . included in the GAO study."¹⁵⁸ "Continental Airlines hired permanent replacements in 1985 for over 8,000 striking pilots, machinists, and flight attendants. And the Eastern Airlines dispute resulted in the permanent replacement of over 7,000 striking employees in 1989."¹⁵⁹

The GAO findings were confirmed by the Gramm study.¹⁶⁰ Gramm conducted two random samplings of strikes, one in New York State and the other nationwide.¹⁶¹ She found that in about 16% of the strikes in the U.S. sample, employers used permanent replacements during their last strike.¹⁶² In the New York sample, about 24% of employers had used permanent replacements.¹⁶³ She also found that use of temporary replacements was less frequent: 6% in the U.S. sample and 10% in the New York sample.¹⁶⁴ Gramm concluded that "employers seem to be using permanent replacements more frequently than temporary replacements as an operating strategy during strikes."¹⁶⁵ This conclusion was buttressed by the statements of employers who used permanent replacements, all of

153. *Id.* at 13.

154. *Id.* at 15-18. The GAO also found that in both years the use of permanent replacements was 96% in units of less than 1,000 workers. *Id.* at 18.

155. *Id.* at 17-18. The GAO offered at least two explanations for the differential between the 17% figure (total strikes) and the 4% figure (total striking workers): (1) a strike in which only one person was permanently replaced counted the same as one in which all strikers were replaced, *id.* at 17; and (2) small strikes (i.e., less than 1,000 workers), which accounted for 96% of all strikes involving permanent replacements, counted the same as large strikes, *id.* at 18.

156. *Id.* at 17.

157. *Id.* at 2 n.3.

158. S. REP. NO. 111, *supra* note 10, at 10-11; GAO REPORT, *supra* note 127, at 2 n.3.

159. S. REP. NO. 111, *supra* note 10, at 11.

160. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 33-40.

161. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 33. Professor Gramm studied 35 strikes across the country and 21 strikes in New York State, compiling her data from surveys of managers who were involved in those strikes. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

whom told Gramm it had been their first experience.¹⁶⁶ Based on these findings, and their contrast to the findings of the Wharton Study concerning use of replacements prior to the 1980s, Gramm concluded that "employer willingness to hire permanent replacements has increased during the 1980s."¹⁶⁷

Additional evidence of increased use of permanent replacements since the 1980s is found in an AFL-CIO Department of Employee Benefits study. The study examined major strikes (1,000 workers or more) reported to the FMCS in 1990 in which permanent replacements were hired.¹⁶⁸ The survey found that 243,300 workers participated in these large strikes in 1990 and approximately 11% (26,450) were permanently replaced.¹⁶⁹ The study also indicated that 55% of all strikes were prompted by labor-management disputes in which the employer was demanding health care benefits concessions from the union;¹⁷⁰ in those strikes 69% of the workers were permanently replaced.¹⁷¹

Finally, a 1991 UAW study corroborates the increasing use of permanent replacements. The UAW survey queried international UAW staff field representatives from across the country about the actual use and threatened use of permanent replacements in their jurisdiction since the mid-1980s.¹⁷² There were forty-two reported instances in which some form of replacements was used: twenty-seven of these companies used permanent replacements, six companies used temporary replacements, one used both, and eight did not specify.¹⁷³

The UAW study also demonstrated that the mere threat of permanent replacements can have a devastating effect on union

166. *Id.* at 34-35.

167. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 35. Gramm's conclusions regarding the increased tendency of employers to use permanent replacements was verified by a survey conducted by the Bureau of National Affairs (BNA). The BNA found that 82% of the employers surveyed, if struck in 1991, would consider replacing workers if they went on strike, *Strike Breaking*, 59 ECON. NOTES (Lab. Res. Ass'n), Jan.-Feb. 1991, at 1, 2, up from the 73% that expressed such attitudes in 1986, DEP'T OF EMPLOYEE BENEFITS, A.F.L.-C.I.O., *supra* note 147, at 4.

168. DEP'T OF EMPLOYEE BENEFITS, A.F.L.-C.I.O., *supra* note 147, at 2. The study used data collected from the Bureau of Labor Statistics and from a phone survey of the unions named therein. *Id.* Of the 51 strikes reported, they contacted union representatives involved in 48 of them. *Id.* See also *AFL-CIO Study Indicates Increase in Permanent Replacement of Strikers*, Daily Lab. Rep. (BNA) No. 114, at A-3 (June 13, 1991), available in LEXIS, BNA Library, DLABRT File.

169. DEP'T. OF EMPLOYEE BENEFITS, A.F.L.-C.I.O., *supra* note 147, at 5.

170. *Id.* at 3. The report also noted that the majority of services reported rendered by FMCS were over health care issues. *Id.*

171. *Id.* at 2.

172. *Labor Comm. Hearings*, *supra* note 3, at 218-21.

173. *Id.* at 218.

bargaining leverage or the attempt to organize new units.¹⁷⁴ Of the twenty-four cases in which threats were made before, during or after collective bargaining began, twenty-one of the union representatives reported accepting concessions or working without a contract.¹⁷⁵ Out of the twenty-one instances in which a threat was issued during an organizing drive, the union was defeated in fourteen cases and abandoned the organizing drive in two others.¹⁷⁶

The findings of the GAO study, the Gramm report, the AFL-CIO study, and the UAW survey are essentially consistent. All four studies found that management has been increasingly more apt to use permanent replacements in response to an economic strike dur-

174. The 1991-92 dispute between the UAW and Caterpillar, Inc. (CAT), demonstrates that the mere threat of permanent replacement may have a significant impact on the balance of power between labor and management. On November 4, 1991, UAW workers employed by CAT, a large multi-national agricultural equipment manufacturer, voted to begin a limited strike of 2,000 workers. *Auto Workers Launches Limited Strike at Two Caterpillar Inc. Plants in Illinois*, Daily Lab. Rep. (BNA) No. 214, at A-3 (Nov. 5, 1991), available in LEXIS, BNA Library, DLABRT File. The critical issue separating the UAW and CAT was whether the new contract would be patterned after a recently executed contract between the UAW and Deere & Company. *Caterpillar, UAW Meet under the Auspices of FMCS*, Daily Lab. Rep. (BNA) No. 72, at A-16 (Apr. 14, 1992), available in LEXIS, BNA Library, DLABRT File [hereinafter *Auspices of FMCS*]. Accordingly, the UAW sought \$40,000 as top pay for senior skilled craftsmen at the plant in 1994, as was achieved in the Deere & Co. contract, while CAT proposed top pay of \$39,000. Jonathan P. Hicks, *Union Agrees to End Strike at Caterpillar*, N.Y. TIMES, Apr. 15, 1992, at A-1. By April 2, 1992, five months after the strike's inception, it had expanded to include 12,600 strikers. *Caterpillar Asks Strikers Back; UAW Authorizes More Strikes*, Daily Lab. Rep. (BNA) No. 64, at A-A (Apr. 2, 1992), available in LEXIS, BNA Library, DLABRT File.

In this context, CAT issued an ultimatum to the union: either the strikers return to work by April 6, or CAT would begin hiring permanent replacements. *Id.* At this critical juncture, President Bush did not favor any federal involvement in the dispute. *Bush Sees No Role for Government in Caterpillar-UAW Contract Dispute*, Daily Lab. Rep. (BNA) No. 71, at A-13 (Apr. 13, 1992), available in LEXIS, BNA Library, DLABRT File. Nevertheless, both parties agreed to meet with the Director of the FMCS, Bernard DeLury, to seek a mediated settlement on April 13 and 14. *Auspices of FMCS, supra*, at A-16. At the conclusion of the mediation, the UAW agreed to end the strike and ultimately accepted CAT's last offer, even though it represented a break from a long tradition of patterned collective bargaining agreements. *Caterpillar Negotiations May Resume Next Week, FMCS Says*, Daily Lab. Rep. (BNA) No. 74, at A-10 (Apr. 16, 1992), available in LEXIS, BNA Library, DLABRT File; Hicks, *supra*, at A-1; Robert L. Rose, *UAW Agrees to End Strike at Caterpillar*, WALL ST. J., Apr. 15, 1992, at A-3.

The CAT strike demonstrates that an employer need not use permanent replacements to adversely affect a union worker's statutory right to strike. The mere threat of permanent replacement is a powerful weapon in the hands of management. In the UAW-CAT dispute, it was a major factor causing the union to give up its quest for a patterned agreement, notwithstanding the fact that such agreements had been the industry standard in UAW contracts for decades prior to the dispute.

175. *Labor Comm. Hearings, supra* note 3, at 219, 221.

176. *Id.* at 219.

ing the 1980s and early 1990s. Given the contrary findings of the Wharton Study, which analyzed management practices prior to the 1980s, the conclusion that management has increasingly used, threatened to use, and had the propensity to use permanent replacements since the 1980s is substantiated. Management's use of permanent replacements, the devastating effects permanent replacements have on unions, and the fact that employers can adequately fill positions with temporary employees, indicate an increasingly hostile management disposition towards the existence of organized labor.

III. CONSTRUING MANAGEMENT'S ATTITUDINAL EMBOLDENMENT

Examination of recent interaction between management and unions evidences management's increasingly blatant hostility towards the existence of unions and the collective bargaining process. Various theories have attempted to trace the roots of this attitudinal emboldenment to historical material foundations. One explanation posits that "[u]nions find themselves dealing increasingly with conglomerates and multinational corporations that can more easily weather economic struggles . . . than could their predecessor counterparts."¹⁷⁷ With this trend towards conglomeration, employers may feel better equipped economically to take a powerful stance against unions. The Senate Committee on Labor and Human Resources has offered its own hypothesis:

Since 1981, there has been a wave of mergers and leveraged buyouts in this country, along with a distorted focus on short-term performance. Many corporate managers—overloaded with debt and in possession of new companies with which they have had no long-term relationship—have tended to regard workers as mere assets to be used and discarded. Because they have just taken over an enterprise, these new employers have no sense of commitment to their newly acquired workforce or to the local community. Frequently, their interest in short-term returns leads them to ignore or even sacrifice long-term employee interests by getting rid of a loyal, experienced workforce. . . .¹⁷⁸

The argument concludes that this so-called "new breed of employer" does not hesitate to replace permanently a union workforce."¹⁷⁹

Notwithstanding various theories that have attempted to trace

177. Atleson, *supra* note 108, at 842.

178. S. REP. NO. 111, *supra* note 10, at 14.

179. See *supra* text accompanying notes 129-30 for a discussion of the Committee's findings that prior to the 1980s permanent replacements may not have been used due to a concern for maintaining a positive public image, and because managers had long-term ties to their community and would have had to live with the divisions caused by using permanent replacements.

the roots of management's bolder expression of anti-union attitudes—a full discussion of which is not within the scope of this article—management's hostility towards labor has now become so potent as to be considered an independent force, affecting the dynamics of labor-management relations, and becoming an integral element in arguments justifying the need for the Workplace Fairness Act. While passage of the Workplace Fairness Act may not change management's attitude, it can help to limit the scope of management's expression of anti-union attitudes and thereby effectuate the promise of the NLRA.¹⁸⁰

A. *The Non-Necessity of Permanent Replacements and Their Devastating Anti-Union Effect Expose Managements' Attitudes*

The evidence establishes that employers can adequately fill positions by offering prospective replacements temporary positions, and that depriving management of its *Mackay* doctrine prerogative will not devastate management's ability to run its operation during a strike.¹⁸¹ Additionally, the evidence unequivocally demonstrates that use of permanent replacements devastates unions, entrenches conflict, and harms labor-management relations.¹⁸² Nevertheless management has increased its use of permanent replacements since the 1980s and has denied any anti-union animus in doing so.¹⁸³ Is it possible that notwithstanding the multitude of devastating effects management's use of permanent replacements perpetuates against unions, its increased use of them is innocent?

According to James P. Melican, Senior Vice-President and General Counsel of International Paper Co., management's use of permanent replacements is innocent: that is, management's purpose is

180. See *supra* notes 12-33 and accompanying text (describing the intent of the Congress in enacting the NLRA). Evidence suggests that other countries may have somewhat successfully controlled the aggressive expression of anti-union attitudes. For example, in Canada, the ethos and traditions of labor-management relations may be quite different compared to the United States. A study conducted by Professor Atleson compared attitudes and legal structures in Canada and the United States: "American employers have shifted to a more militant posture including fervent opposition to union organization, greater assertiveness in bargaining and strategies in personnel relations to blunt the attractiveness of unionism to employees. In Canada, on the other hand, union acceptance generally exists among large Canadian firms." James B. Atleson, *The Role of Law and Union Organizing: Thoughts on the United States and Canada* (Sept. 1991) (unpublished manuscript, on file with the University of Buffalo School of Law, Canadian-American Legal Studies Program). See generally CHARLES J. MORRIS, *AMERICAN LABOR POLICY* 406-11 (1987) (suggesting that management could benefit by a less hostile and aggressive stance toward labor).

181. See *supra* part II.B.

182. See *supra* part I.B.1.

183. See *supra* part II.B-C.

not to bust unions.¹⁸⁴ However, if this were true, then the following impacts would merely be coincidental side effects, completely unrelated to any underlying intention to destroy the union: (1) the undermined integrity of the union as a viable bargaining representative;¹⁸⁵ (2) the enhanced likelihood that the union will be decertified;¹⁸⁶ (3) the decreased likelihood that management will have to settle with the union;¹⁸⁷ (4) the increased likelihood that a union will make concessions;¹⁸⁸ (5) the weakening of unions by protracting strikes;¹⁸⁹ (6) the increased chance that a union organizing drive will be unsuccessful;¹⁹⁰ and finally (7) shifting the resolution of a given union's representational status away from NLRB determination and into the private hands of management.¹⁹¹

The assertion of Workplace Fairness Act opponents that use of permanent replacements is merely an innocent resort to *just another* possible economic weapon in the process of jockeying for position at the collective bargaining table is disingenuous at best. Even if management does not use permanent replacements for the purpose of breaking unions, it is highly likely that they are at least aware of the devastating effects their use brings to bear on unions. In this context, management's needless use of permanent replacements, with its simultaneous awareness that such practices devastate unions, hardly supports a claim of innocence.¹⁹² Whether it be purposeful use, knowing use, or

184. Miller, *supra* note 9 ("Industry opponents of the legislation, not surprisingly, deny that hiring of permanent striker replacements is motivated by union busting."); see also *Labor Comm. Hearings*, *supra* note 3, at 119-20 (statement of Thomas C. Foley, business owner employing 7,000 workers, claiming that use of permanent replacements was most viable alternative to keep company running); *id.* at 139 (statement of Peter G. Nash claiming that resort to permanent replacements is "part and parcel of the free economic interplay which the NLRA was designed to foster").

185. See *supra* notes 51-56 and accompanying text.

186. See *supra* notes 51-56 and accompanying text.

187. See *supra* notes 57-63 and accompanying text.

188. See *supra* note 55 and accompanying text.

189. See *supra* notes 57-63 and accompanying text.

190. See *supra* notes 174-76 and accompanying text.

191. See *supra* notes 51-56 and accompanying text.

192. In criminal law, a defendant may be culpable for causing the death of another individual even if the defendant did not purposely cause the death of the victim. One criminal statute in New York provides, among other things, that "a person is guilty of manslaughter in the first degree when: . . . [b]eing eighteen years old or more and with intent to cause physical injury to a person . . . , the defendant recklessly engages in conduct which . . . causes the death of such person." N.Y. PENAL LAW § 125.20 (McKinney 1990) (emphasis added). Reckless conduct does not require that a person act with the "conscious objective . . . [of] caus[ing] the [unlawful] result"; instead it merely requires that the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur." N.Y. PENAL LAW § 15.05 (McKinney 1990).

Thus if one applies the standards of culpability used in criminal law to an employer's use of permanent replacements, an employer's claim of innocence is not effective. If the

even reckless use of permanent replacements, the increasingly blatant expression of management's anti-union attitudes are forcefully implicated.

However, even if we were to take employers at their word and assume that their use of permanent replacements is completely innocent, and further assume that they are oblivious to the devastating effects noted above, their denial of specific intent is irrelevant under an analysis guided by the principles of the NLRA.¹⁹³ Section 7 of the NLRA created a statutory right to "engage in . . . concerted activities for the purpose of collective bargaining."¹⁹⁴ This right is further protected by section 8(a)(1) of the NLRA, which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."¹⁹⁵ Under the dictates of section 8(a)(1) of the NLRA, it is not necessary to find anti-union animus in order to deem the employer's conduct an unfair labor practice.¹⁹⁶ In this regard the Supreme Court in *NLRB v. Erie Resistor Corp.* noted:

[S]pecific evidence of . . . subjective intent is "not an indispensable element of proof of violation." "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. . . . The existence of discrimination may at times be inferred by the Board, for 'it is permissible to draw on experience in factual inquiries.'"¹⁹⁷

employer merely *consciously disregarded* the substantial risk that use of permanent replacements would devastate unions, such awareness, in and of itself, would be sufficient to constitute a culpable mental state under criminal law standards. Thus, an employer's use of permanent replacements cannot be considered an innocent act even if management did not do so solely for the purpose of destroying unions.

193. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988).

194. NLRA § 7, 29 U.S.C. § 157 (1988) (emphasis added).

195. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1988).

196. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963), the Supreme Court held that an employer's offer of super-seniority to striker replacements and strikers choosing to return to work was so inherently destructive of the right to strike that the scheme was deemed an unfair labor practice regardless of the employer's intent. *See also* *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) (limiting the rule in *Erie Resistor* by balancing the harm to the union against the employer's business interest in taking the action); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-80 (1967) (holding that, absent proof of legitimate and substantial business justifications, an employer's refusal to reinstate strikers when vacancies occurred was an unfair labor practice irrespective of the employer's intent in refusing reinstatement); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 106 (7th Cir. 1969) (holding that employer's threat to deny employment "forever" if employees went on strike, and subsequent refusal to reinstate after the strike ended were unfair labor practices irrespective of the employer's actual intent), *cert. denied*, 397 U.S. 920 (1970).

197. 373 U.S. at 227 (alteration in original) (citations omitted). Later in the *Erie Resistor* opinion the court reiterated that it was not necessary to find specific intent for certain classes of employer activities:

The ruling in *Erie Resistor*, eliminating the need to prove employer intent, was limited four years later in *NLRB v. Great Dane Trailers, Inc.*¹⁹⁸ In *Great Dane*, the Supreme Court added the following proviso to the *Erie Resistor* rule: "[I]f the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."¹⁹⁹

Erie Resistor and *Great Dane* construe section 8(a)(1) of the NLRA so as to arguably render use of permanent replacements an unfair labor practice. Permanent replacements have devastating effects on unions,²⁰⁰ and the business justification for their use is minimal.²⁰¹ Whether or not management denies discriminatory intent in using permanent replacements is actually irrelevant to an analysis under section 8(a)(1) of the NLRA since intent is not necessary to find the employer's conduct an unfair labor practice. Notwithstanding management's state-of-mind, use of permanent replacements constitutes an unfair labor practice, in addition to evidencing an escalation in anti-union conduct. Since the Supreme Court refuses to overrule the *Mackay* doctrine and has in fact expanded its application, passage of the Workplace Fairness Act is necessary to compel the courts to find an employer's use of permanent replacements exactly what it is—an unfair labor practice.

B. *Collateral Evidence Further Illustrating Management's Increasingly Hostile Attitude Towards Unions*

Simultaneous with its expanded use of permanent replacements, management has increasingly resorted to other collateral practices which corroborate the presence of aggressive anti-union attitudes. In the 1980s, employers expanded their use of unfair labor practices (ULP). In fact, the number of ULP charges "has more than doubled, from below 10,000 each year in the 1960s, to above 20,000 each year in the 1980s."²⁰²

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out.

Id. at 228.

198. 388 U.S. 26 (1967).

199. *Id.* at 34.

200. See *supra* part I.B.1 and II.C.

201. See *supra* part II.B.

202. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 14 (citing statistics from the

Even more indicative of management's increasingly hostile disposition is the fact that the percentage and number of ULP cases deemed meritorious has risen significantly: "From 1946 to 1977, roughly 70 percent of cases were withdrawn or dismissed. For most of the 1980s, only 60 percent were so treated."²⁰³ Moreover, twice in the 1980s the number of workers reinstated by court or NLRB order as a result of successful ULP suits by workers for discriminatory discharge reached 10,000 workers or more; in contrast, between 1946 and 1980 that number only reached 6,000 twice.²⁰⁴

The relevance of management's resort to unfair labor practices is more significant than the harm to specific individuals. Data indicates that an employer is actually rewarded by its illegal conduct. In particular, where employers engage in such illegal activities, the chance of a union successfully organizing a new unit is only seventeen percent, while in the absence of such employer misconduct, the rate of success increases to an average of forty-seven percent.²⁰⁵ ULPs also "diminish by one third the likelihood that a union will actually secure a first contract."²⁰⁶ These collateral developments,

NLRB indicating a general rise in the incidence of ULPs). The statistics cited by the Institute separately document the incidence of discriminatory discharge cases. *Id.* at 15-16. They also document resolution of ULPs by methods of disposition, *id.* at 14-15, by the number of employees in the workplace, *id.* at 14, and by the median length of time required to resolve the case, *id.* at 16-17.

203. *Id.* at 15 (citation omitted); see also Paul Weiler, *Promises to Keep: Securing Worker's Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1778-81 (1983) (discussing statistics which reveal that the number of ULPs filed has increased, and the rate at which they are deemed meritorious has risen from 29.1% in 1960 to 39% in 1980).

204. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 16.

205. William Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 572-73 (1983). The projections proffered by Dickens were derived through computer simulations from statistics compiled in 1976, *id.* at 560, 571-73, and his results are corroborated by a General Accounting Office (GAO) study, *id.* at 560 (citing GENERAL ACCOUNTING OFFICE, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES, H.R. DOC. NO. 80, 97th Cong., 2d Sess. 3 (1982)).

206. Weiler, *supra* note 15, at 357. "In light of this evidence, the troubling decline of collective bargaining in the private sector must be attributed in large part to the astonishing increase in employers' use of illegal tactics to resist union representation of their employees." *Id.* The problem is further exacerbated by delays in processing of ULP charges. The NLRB takes more than 700 days to process a charge, while in Canada the processing rate is only 120-180 days. ECONOMIC POLICY INSTITUTE, *supra* note 15, at 16 (citing statistics from the NLRB and Peter G. Bruce, *The Processing of Unfair Labor Practice Cases in the United States and Ontario*, 45 RELATIONS INDUSTRIELLES 481 (1990)). A study by the GAO revealed that the median processing times were at the highest level in agency history during the years 1984-89. GAO *Urges Labor Board to Adopt Time Targets*, Daily Lab. Rep. (BNA) No. 193, at A-A (Oct. 4, 1990), available in LEXIS, BNA Library, DLABRT File. Moreover, nearly one in five cases took more than two years to decide. *Id.*

occurring simultaneously with management's significantly increased use of permanent replacements, strongly supports the argument that management's claims of innocent intent are prevarications at best.

IV. CONCLUSION

Management has increasingly used permanent replacements since the 1980s, and when management uses such replacements the union is frequently devastated. Simultaneous with the increased use of permanent replacements and its devastating impact on unions, management has also increasingly resorted to other unfair labor practices. The rate at which ULP suits have been deemed meritorious is at its highest point in the history of the NLRA, and the evidence shows that management's resort to unfair labor practices sabotages a union's ability to function effectively. The parallel development of management's increased use of permanent replacements and resort to unfair labor practices since the 1980s, and the devastating impact both practices have on unions are not mere coincidences. Indeed, each time management uses permanent replacements, resorts to unfair labor practices, and disregards the devastation inflicted on unions, management's aggressive anti-union attitudes are revealed.

Regardless of the roots of this attitudinal emboldenment, the harmful effects of bold anti-union attitudes have become a significant force in and of themselves. Consequently, the creative drive of management and its anti-union consultants to find new ways to circumvent their obligation to deal with unions will proceed unrelentingly until a "union free environment" is achieved.²⁰⁷ A Senate Committee Report assessing the merits of the Workplace Fairness Act elaborated on this point:

Given the cumulative changes in the legal rules, as well as the changes in the economic climate and employer attitudes, the committee concludes

207. Thomas Donahue, Secretary-Treasurer of the A.F.L.-C.I.O. commented on the increasingly prevalent use of anti-union consultants:

[There has been the creation] since sometime in the mid-1970s . . . of an entire industry, an entire army, of labor-management consultants who are peddling their wares to employers and encouraging them to exist in a "union-free environment," a phrase trumpeted by the largest association of employers in the United States. That's what contributes to a bad climate—the [National Association of Manufacturers'] "union-free" campaign. . . .

Labor Comm. Hearings, *supra* note 3, at 31. This view is supported by Dickens, *supra* note 206, at 563-65. Anti-union consultants have published books which outline how to plan extensively and run anti-union campaigns. See generally ROBERT LEWIS & WILLIAM A. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT STRATEGY AND PREVENTIVE PROGRAMS (1979).

that, without a change in applicable Federal law, the increased use of permanent replacements will continue, and the survival of collective bargaining in the private sector of the economy hangs in the balance.²⁰⁸

As a counter measure, the Workplace Fairness Act cannot change management's attitudes. However, it would function to remove at least one of the means by which management may legitimately give effect to its increasingly bold anti-union attitudes and forcefully limit the range of possibilities which can be creatively devised to break unions.²⁰⁹ Finally, passage of the Workplace Fairness Act would help to assure the legitimate place of unions in this society and thus enhance and effectuate the promise of the NLRA.

208. S. REP. NO. 111, *supra* note 10, at 16.

209. One author has proposed the following as a compromise means of safeguarding against such anti-union intent:

[E]ven if it were true that *some* employers on *some* occasions have to promise permanent jobs in order to recruit the people they need to operate their plant, the current rule is overinclusive because it allows *all* employers to do so [Thus a]t a minimum . . . the law should be changed to require an employer to prove that it actually needed to promise permanent tenure to replacements in order to maintain operations before permitting such a serious inroad on the Section 7 rights of striking employees.

PAUL C. WEILER, GOVERNING THE WORKPLACE 267 (1990) (footnote omitted). *See generally id.* at 264-69; Gillespie, *supra* note 119, at 795; Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 437 (1990) (discussing that "perceived worker unrest helps set the legislative process into motion").